INDEX

	Page
Opinions below	1
Jurisdiction	1
Statute and treaties involved	2
Question presented	4
Statement	4
1. The Treaties of 1802 and 1805	8
2. The Treaty of 1832	11
3. The Treaty of 1833	15
4. The Treaty of 1856	18
Summary of argument	20
Argument	22
Introduction	22
I. The treaties under which petitioner brought its claims do not create a guardian-ward relationship between the parties by virtue of which the United States has the burden of making a precise accounting for treaty obligations over a century old	23
A. Whether the relationship of guardian and ward exists between the United States and an Indian tribe depends upon the express treaty provisions applicable to each transaction and not upon a general fiduciary relationship	23
B. Congress intended the Indian Claims Commission to determine claims on the basis of the specific relationship created by the treaties under which the claims are brought and not on the basis of a general fiduciary relationship	27
C. The relationship between the parties under the treaties involved in the present case was more akin to creditor and debtor than to guardian and ward	31
II. Congress intended that, under the Indian Claims Commission Act, the burden would be on an Indian tribe to prove its claims; petitioner failed to sustain that burden	35

Page

Conclusion 46
Appendix A: Treaty provisions 47
1. The Treaty of 1802 47
2. The Treaty of 1805 48
3. The Treaty of 1832 49
4. The Treaty of 1833 50
5. The Treaty of 1856 51
Appendix B: The General Accounting Office Report 56
Appendix C: Appropriation lists 62

CITATIONS

Cases:
Cherokee Nation v. *Georgia*, 5 Pet. 1 24
Chickasaw Nation v. *United States*, 103 C.Cls. 1, reversed on other grounds, 326 U.S. 217 41
Choctaw Nation v. *United States*, 119 U.S. 1 40
Choctaw and Chickasaw Nations v. *United States*, 75 C.Cls. 494 26
Creek Nation v. *United States*, No. H–510, 78 C.Cls. 474 5
Creek Nation v. *United States*, 318 U.S. 629 ..... 20, 24, 25, 32
Gila River Pima-Maricopa Indian Community v. *United States*, 140 F. Supp. 776 15
Kansas or Kaw Indians v. *United States*, 80 C.Cls. 264, certiorari denied, 296 U.S. 577 26
Menominee Tribe v. *United States*, 101 C.Cls. 10 28
Menominee Tribe of Indians v. *United States*, 102 C.Cls. 555 28
Miami Tribe of Oklahoma v. *United States*, 9 Ind. Cl. Comm. 580 ..... 36, 38, 39
Quick Bear v. *Leupp*, 210 U.S. 50 33
Seminole Nation v. *United States*, 316 U.S. 286 38
Sioux Tribe of Indians v. *United States*, 146 F. Supp. 229 26
Skokomish Indian Tribe v. *France*, 269 F.2d 555 25
United States v. *Kagama*, 118 U.S. 375 24
United States v. *Payne*, 264 U.S. 446 24
Statutes and Treaties:
Act of June 30, 1834, 4 Stat. 735 ..... 17, 44
Act of June 17, 1844, 5 Stat. 704 16
Act of May 27, 1902, 32 Stat. 245 ..... 9, 33

Statutes and Treaties—Continued Page
Act of September 3, 1935, 49 Stat. 1085 28
Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. 70–70v 27
Section 2 2, 36
Section 14 39, 42
Act of May 24, 1949, 63 Stat. 89, 28 U.S.C. 1505 31
Treaty of August 7, 1790, 7 Stat. 35 32, 43, 57, 58
Treaty of June 16, 1802, 7 Stat. 68 8, 9, 10, 11, 32, 43, 47
Treaty of November 14, 1805, 7 Stat. 96 9, 10, 11, 32, 33, 43, 48
Treaty of March 24, 1832, 7 Stat. 366 11, 12, 13, 14, 15, 32, 33, 44, 49
Treaty of February 11, 1833, 7 Stat. 417 15, 16, 17, 18, 32, 44, 45, 50
Treaty of January 4, 1845, 9 Stat. 821, as amended 11, 12, 13, 14, 44
Treaty of August 7, 1856, 11 Stat. 699 11, 14, 17, 18, 33, 45, 51, 53
Treaty of July 10, 1861 with the Confederate States of America, C.S.A. Provisional Gov't. Stats. (1861–1862) 13
28 U.S.C.A. 1505 31
Miscellaneous:
Cohen, Felix S., *Handbook of Federal Indian Law* (1942) 24
92 Cong. Rec. 5309–5323, 5310, 5311, 5316, 9217–9219 29, 30, 36
Hearings on H.R. 1198 and H.R. 1341, before the House Committee on Indian Affairs, 79th Cong., 1st Sess 27, 28, 36, 37
Hearings on H.R. 4497 before the Senate Committee on Indian Affairs, 79th Cong., 2d Sess 30
H.R. 4497, 79th Cong., 1st Sess 28
H. Rep. No. 1466, 79th Cong., 1st Sess 29, 37
H. Rep. No. 2693, 79th Cong., 2d Sess 30, 31, 35
H. Rep. No. 352, 81st Cong., 1st Sess 31
S. Rep. No. 1715, 79th Cong., 1st Sess 30, 31, 37
United States Department of the Interior, *Federal Indian Law* (1958) 27

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 124

CREEK NATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The findings of fact (R. 264–273) and opinion (R. 273–283) of the Indian Claims Commission are reported at 7 Ind. Cl. Comm. 117. The opinion of the Court of Claims (R. 292–315) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 1, 1961 (R. 292). The petition for a writ of certiorari was filed on May 29, 1961, and was granted on October 9, 1961 (R. 315; 368 U.S. 811). The jurisdiction of this Court rests on 28 U.S.C. 1255(1) and Section 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1054, 25 U.S.C. 70s(c).

STATUTE AND TREATIES INVOLVED

Section 2 of the Indian Claims Commission Act, 60 Stat. 1050, 25 U.S.C. 70a, reads as follows:

> Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.
>
> All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all

other defenses shall be available to the United States.

In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U.S.C. section 250), as amended; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984), save expenditures made under section 5 of that Act, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment

> and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

The pertinent portions of the five treaties between the United States and the Creek Nation upon which the claims in the present case are based are set forth in Appendix A to this brief, *infra*, pp. 47–55.

QUESTION PRESENTED

Whether, in a suit by an Indian tribe against the United States to recover amounts which the latter allegedly had failed to pay the tribe under certain treaties, the burden is on the United States to show payment by proving that sums actually paid to the tribe were in fact allocated to the discharge of particular treaty obligations; or whether, as the Indian Claims Commission and the Court of Claims held, the burden is on the tribe to prove non-payment.

STATEMENT

Petitioner, the Creek Nation, brought this action before the Indian Claims Commission to recover amounts allegedly due under certain provisions of five treaties betweeen it and the United States (R. 1–6). These treaties, executed between 1802 and 1856, imposed upon the United States obligations to make payments and to provide goods and services to petitioner, which, petitioner alleged, had not been completely fulfilled by the United States. In answer (R. 7–14), the United States asserted that it

had fulfilled all the obligations in question and denied indebtedness to the petitioner in any amount (R. 8, par. 6). The United States also asserted several other defenses, among them *res judicata* (R. 7, par. 2) and release (R. 9, par. 11), but the Indian Claims Commission found it unnecessary to consider these defenses because of its decision on the merits (R. 282).[1]

To support its claims, the petitioner relied principally upon a report which the General Accounting Office had prepared for use in an earlier suit brought by petitioner against the United States, *Creek Nation* v. *United States*, No. H-510, 78 C. Cls. 474.[2] In this report, the General Accounting Office attempted to list all treaty obligations to the Creek Nation and all payments on such obligations. Because of the inadequacy of records during the first part of the nineteenth century, however, and because of the difficulties involved in paying funds to refugee Indians during the Civil War, the General Accounting Office was unable to attribute certain specific payments to particular treaty obligations (R. 24–26, 122). For example, in Section T of Part III of the G.A.O. Report (R. 122–129), concerning disbursements made between 1811 and 1834 not attributable to particular treaties, the G.A.O. states in its introductory discussion (R. 122):

---

[1] Accordingly, these defenses are not discussed in this brief; they are reserved in the event that the cause is remanded.

[2] No. H-510 was one of several units brought under the special jurisdictional Act of May 24, 1924, 43 Stat. 139, as amended (see R. 7, Par. 2).

> An examination of the records of the General Accounting Office discloses that during the years from 1811 to 1834, certain disbursements were made by the United States for the benefit of the Creek Nation of Indians for purposes stipulated in various treaties with said nation, which, due to the lack of sufficient data, could not be identified as having been disbursed in fulfillment of any particular treaty. Therefore, no attempt has been made to allocate said disbursements under specific treaties, but they have been set out in this report in order to show as completely as possible all disbursements made by the United States pursuant to treaties with the Creek Nation of Indians.

The United States contended that the disbursements shown in Section T should be credited against treaty obligations in force from 1811 to 1834, whereas petitioner insisted that only when the G.A.O. Report attributed specific payments to particular treaty provisions could the United States be credited for fulfillment of its treaty obligations. Petitioner's claims were therefore for the difference between the amounts allocated in the G.A.O. Report to particular treaties and the total amounts petitioner alleged to be due under these treaties. A detailed explanation of the structure of the G.A.O. Report and the accounting and reporting problems involved in that Report may be found in Appendix B, *infra*, pp. 56–61.

The Indian Claims Commission found that "[t]here is not sufficient evidence in the record to show that any of the indebtedness claimed by the plaintiff has not been discharged" (Fdg. 10, R. 273), and dismissed the case. The Commission stated (R. 277):

> Both parties make many and varying contentions as to the items of charge and credit involved, but we think the disposition of the case, without going into many of the contentions and controversies as to items, is determined by *where the burden of proof lies*—that is whether the burden is on the part of the plaintiff to prove a failure to discharge the obligations undertaken by the defendant, or whether the burden is on the defendant to prove that it discharged these obligations and is liable to the plaintiff upon its failure to do so. This question is determinable by whether the defendant stands in relation to the plaintiff as guardian or as trustee of funds belonging to the plaintiff, or whether the relationship is that of debtor and creditor. [Emphasis by the Commission.]

The Commission rejected the petitioner's contention that the treaty claims it was asserting arose out of a relationship of guardian and ward, and found that such relationship "has not been established by competent or relevant evidence" (Fdg. 3, R. 265). It stated (R. 280) that this case "only involves the relationship of ordinary debtor and creditor"; that under such a relationship one who alleges non-payment has the burden of proving it; and that the petitioner "has not proven the alleged failures of the defendant to fulfill its obligations as it is its duty to do before any recovery can be had" (R. 282).

The Court of Claims, "being in agreement with the disposition of the case made by the Indian Claims Commission," affirmed the judgment of dismissal (R. 292). Judges Littleton and Madden, dissenting,

were of the view that "the relationship between the United States and an Indian Tribe is sufficiently similar to the relationship between a guardian and its ward to impose upon the United States the burden of clearly accounting for its fulfillment of its Indian treaties" (R. 297), and that the government had failed to sustain that burden.

The claims brought under the five treaties, the evidence presented, and the disposition by the Indian Claims Commission may be summarized as follows:

1. THE TREATIES OF 1802 AND 1805

In return for the cession of lands described in Article I of the Treaty of June 16, 1802, 7 Stat. 68 (see App. A, *infra*, pp. 47–48), the United States agreed in Article II to pay—

> * * * annually, and every year, the sum of three thousand dollars, and one thousand dollars for the term of ten years, to the chiefs who administer the government, * * * and also twenty-five thousand dollars in the manner and form following, viz: Ten thousand dollars in goods and merchandise, the receipt of which is hereby acknowledged; ten thousand dollars to satisfy certain debts due from Indians and white persons of the Creek country to the factory of the United States; * * * five thousand dollars to satisfy claims for property taken by individuals of the said nation, from the citizens of the United States * * *.

The Treaty became effective on January 11, 1803, the date of its proclamation by the President. The $3,000 annuity remained in effect from 1803 through

fiscal year 1902, when the permanent annuities of the Creek Nation were funded pursuant to the Act of May 27, 1902, 32 Stat. 245 (R. 22, 118, 119, 266), a period of 100 years. The Creek Nation has eliminated from this suit any claim for annuity payments due during the Civil War period, or for fiscal years 1862 through 1867, this period being covered in another suit before the Indian Claims Commission (R. 266, fn.; see Third Defense, R. 8–9).

The parties agreed that $317,000 was the amount of the obligation of the United States under the 1802 Treaty (R. 266), and petitioner admitted the disbursement to it of $254,690.25 (R. 267; see Pet. Br. 8). This amount was derived from figures specifically shown by the G.A.O. Report to have been paid pursuant to the 1802 Treaty (R. 45–49, 119; see Pet. Br. 8), plus the $10,000 worth of goods, receipt of which was acknowledged in the Treaty. Subtracting the $254,690.25 admittedly disbursed from the original obligation of $317,000, petitioner claimed that $62,309.75 was still due under the 1802 Treaty (R. 267; Pet. Br. 9).

In Article III of the Treaty of November 14, 1805, 7 Stat. 96 (see App. A, *infra*, p. 48), the United States agreed to pay—

> * * * annually * * * for the term of eight years, twelve thousand dollars in money or goods, and implements of husbandry * * *; and eleven thousand dollars shall be paid in like manner, annually, for the terms of the ten succeeding years, making in the whole, eighteen payments in the course of eighteen years, without interest. * * *

The total obligation of the United States under this article amounted to $206,000.00. On the basis of the G.A.O. Report (see R. 50), the Indian Claims Commission noted that, although the full $206,000 was appropriated, disbursements of only $169,452.25 could be definitely allocated to fulfillment of the obligations of this treaty (R. 269). Petitioner therefore claimed that $36,547.75 still remained unpaid under the 1805 Treaty (see Pet. Br. 10).

From the G.A.O. Report (R. 23–24, 127–129), the Indian Claims Commission found that an additional $99,461.45 had been disbursed to the Creek Nation between the years 1803 and 1818 "which the General Accounting Office cannot definitely and clearly identify as having been disbursements in fulfillment of the obligations of the Treaty of 1802 or 1805" (R. 267–269).[3] The Commission found further (Fdg. 5, R. 268–269) that the unallocated disbursement of $99,461.45 exceeded the amounts petitioner claimed were still due under the Treaties of 1802 and 1805 since the $62,309.75 petitioner claimed under the 1802 Treaty and the $36,547.75 claimed under the 1805 Treaty added up to only $98,857.50 (see Pet. Br. 11).

In addition to the G.A.O. Report, the United States introduced a considerable bulk of receipts, letters, reports, etc., showing specific disbursements in the Creek country, which it claimed were in discharge of

[3] With respect to specific payments due under the Treaty of 1802 for the years 1805 to 1811, inclusive, Section C of Part III of the G.A.O. Report (R. 41–49) states (R. 41): "Due to the incompleteness of the records covering said years, it cannot be definitely stated that said sum is the total disbursed pursuant to said treaty for said years."

the obligations under the 1802 and 1805 Treaties (R. 201–249). See, *e.g.*, letter of 1809 stating receipt of "Invoices of the annual stipend to the Creeks for this year" (R. 223). The Commission made no finding concerning this evidence.

2. THE TREATY OF 1832

The Treaty of March 24, 1832, 7 Stat. 366 (App. A, *infra*, p. 49), contained several provisions creating obligations of the United States. The only one upon which a claim was based appears in Article XIII:

> Three thousand dollars, to be expended as the President may direct, shall be allowed for the term of twenty years for teaching their children. * * *

The total obligation for the 20 years was therefore $60,000. But Article IV of the Treaty of January 4, 1845, 9 Stat. 821, as amended, provided for an additional educational annuity of $3,000, and extended the $3,000 annuity available under the 1832 Treaty to 1864, thus increasing the 1832 obligation to $99,000. Moreover, in Article V of the Treaty of August 7, 1856, 11 Stat. 699 (App. A, *infra*, pp. 51–53), the Creek Nation released the United States from all but certain specified obligations. One of the obligations continued (although no arrearages were preserved) was the $6,000 annually for education promised in 1845 Treaty.

The evidence bearing on the issue of fulfillment of the Treaty of 1832 before 1835 is meagre. The United States introduced evidence that it had been

willing and prepared to fulfill its obligation to educate Creek children by sending them to the Choctaw Academy, but that the Creeks had refused to furnish the youths to be educated (Ex. 154–156, R. 249–255). Because of the Creeks' refusal to cooperate, the United States was unable to perform its annual obligation fully before 1835, although it did disburse $157.50 in 1832, $502.50 in 1833, and $1,863.48 in 1834 in an effort to fulfill this obligation (R. 59). The United States contended that it was not required to do more and that it had no obligation to petitioner for the years 1832, 1833, and 1834. The Indian Claims Commission made no specific finding on this issue.

Statement No. 24 in the G.A.O. Report (R. 56–58), setting forth the disbursements pursuant to the 1832 Treaty, shows that $49,938.99 was paid out for education under Article XIII up to 1851 (R. 58). The year 1851 would have been the last year in which the educational annuity under Article XIII would have been due, had the annuity not been extended by the Treaty of 1845 (see *supra,* p. 11). The appropriations table for the Treaty of 1832 (R. 134) shows a decrease of $3,000 in the 1852 appropriation, and the table for the Treaty of 1845 (App. C, *infra,* p. 63) shows an increase of $3,000 a year from 1852 to 1864. Disbursement Schedule No. 86 (R. 93–96) shows that $60,673.23 was disbursed under the 1845 Treaty from 1852 to 1861.[4] For that 10-year period,

[4] The $77,422.51 total appearing at the end of Disbursement Schedule No. 86 includes amounts paid before 1852, which are attributable only to the 1845 Treaty.

$60,000 would have been due, $30,000 under the new obligation created in the 1845 Treaty and $30,000 under the obligation created in the 1832 Treaty as extended by the 1845 Treaty. If half the money paid out between 1852 and 1861 be attributed to the 1831 Treaty, $30,336.11 should be added to the amount disbursed under that Treaty.

On July 10, 1861, petitioner entered into a treaty with the Confederate States of America (C.S.A. Provisional Government, Stats. (1861–1862), pp. 289, 297–299), in which the Confederacy assumed obligations of the United States to the Creek Nation, including the $6,000 educational annuity of the 1845 Treaty. The United States introduced several exhibits (Nos. 159–177), some of which are reproduced in the record (R. 257–264), to prove that the Confederacy did in fact pay the federal obligations it assumed, including the $12,000 due for 1861 through 1864 under the 1832 Treaty as extended (see Ex. 168, R. 259). The Indian Claims Commission made no specific finding on this evidence.

While the Confederacy was paying the Indian tribes adhering to it during the Civil War, the United States was making payments for the relief of refugee Indians from appropriations to fulfill Creek treaties in force during the Civil War years. Statement No. 4 (R. 33–34) shows that $343,501.17 was disbursed between 1862 and 1867, and this amount exceeds the total obligations in force during the war period, including the Treaty of 1845 and the Treaty of 1832 as extended. The disbursement of monies appropriated for several tribes to

individual refugee Indians in Kansas and Oklahoma made accounting very difficult, but Statement No. 4 is an effort to show what happened to the Creek appropriations. The Creek refugees were also helped with money appropriated for other tribes, as is explained in the G.A.O. Report (R. 26).

Before the Indian Claims Commission, petitioner stated that the Treaty of 1832 created an obligation of $60,000, that the United States had paid only $49,938.99 on it, and that the United States therefore still owed $10,061.01 (see R. 4, par. VI). The United States took the position that the Treaty of 1832, as extended by the Treaty of 1845, was in effect from 1832 to 1864, and created a total obligation of $99,000. It contended that it had been absolved from any obligation for 1832, 1833, and 1834 because of the petitioner's refusal to furnish youths to be educated and that the over-all obligation was thus reduced to $90,000. It also contended that it was not liable for any arrearages prior to 1856 because the Treaty of 1856 had released all debts not specifically reserved and had not reserved any arrearages on the 1832 Treaty. The United States claimed to be entitled to the following credits against the 1832 Treaty obligations:

Disbursements up to 1851	$49,938.99
One-half of disbursements 1852–1861 under 1845 Treaty	30,336.11
Unallocated disbursements in 1832 and 1834	2,662.67
Confederate disbursements	12,000.00
	$94,937.77

The United States also asked that $12,000 of the disbursements to refugee Creeks during the Civil War be credited to the 1832 Treaty.

The Indian Claims Commission's finding on the 1832 Treaty, after stating the effect of the subsequent treaties, concluded with this paragraph (R. 270):

> The plaintiff approves fulfillment by the defendant of the obligations of the Treaty of 1832 in the amount of $49,938.99 as itemized in its Requested Finding 6 and contends that there is a balance due from said obligation in the amount of $10,061.01. This credit in the amount of $49,938.99 is for disbursements up to and including the year 1851 only; however, there were disbursements for the period 1852 to 1861 in the amount of $60,673.23 (Dft's Ex. 185, 186) in fulfillment of the obligations of the treaties of 1832 and 1845 that defendant contends is in full settlement of its obligation made by the Treaty of 1832 and renewed and enlarged by the Treaty of 1845.

3. THE TREATY OF 1833

Petitioner's fourth claim was based on the following provisions of Article V of the Treaty of February 14, 1833, 7 Stat. 417 (see App. A *infra*, pp. 50–51):

> * * * [T]he commissioners * * * agree on behalf of the United States, to furnish to the Creek Indians west of the Mississippi, one blacksmith and one wheelwright or wagon-maker, as soon as they may be required by the nation, in addition to those already em-

> ployed—also, to erect shops and furnish tools for the same, and supply the smith shops with one ton of iron and two hundred and fifty pounds of steel each; and allow the said Creek Indians, annually, for education purposes, the sum of one thousand dollars, to be expended under the direction of the President of the United States—the whole of the above grants to be continued so long as the President may consider them conducive to the interest and welfare of the Creek Indians * * *.

Petitioner alleged that the United States had acknowledged $2,710 a year to be due under these provisions (R. 5). It based its claim on a 39-year period, 1834 through 1878[5] less the six Civil War years, and so claimed that it was suing on a total obligation of $105,690.00. Petitioner admitted that $76,285.45 of this amount had been paid (see Statement No. 30, R. 73)[6] and claimed there was a deficit of $29,404.55 (R. 271). Petitioner concluded that the government had acknowledged an annual obligation of $2,710 from the fact that that sum was almost always the amount appropriated by Congress for the 1833 Treaty (R. 135–136). Petitioner points in particular to the itemization in the appropriation made in the Act of June 17, 1844, 5 Stat. 704, 706, which showed $840 for a blacksmith and assistant, $270 for iron and steel, $600 for a wagonmaker, and $1000 for education (Pet. Br. 22).

---

[5] It is not clear from the record why petitioner terminates the claim in 1878. Congress quit appropriating money under this Treaty in that year (R. 135–136).

[6] Statement No. 30 shows a total disbursement of $84,529.03, but this includes amounts which cannot be credited against petitioner's claim.

The United States denied that any amount had been fixed for the obligation under this Treaty, certainly not before 1856, and further denied that any definite term could be fixed for the discharge of any obligations under the Treaty. The government pointed out that the Treaty made commencement of the services of the artisans conditional upon the petitioner's need and placed the education allowance in the discretion of the President; and that it also specified that both were to continue as long as the President saw fit to continue them. Inasmuch as the Treaty itself did not define the amount or term of the government's obligation, the United States contended that petitioner was obliged to prove the amount of its loss attributable to alleged non-performance by the United States.

The United States also presented argument and evidence to prove fulfillment of its obligations under the 1833 Treaty, but because of the Commission's finding with respect to this Treaty, it is necessary here only to describe this evidence generally. First of all, the government argued that the annual expenditure under this treaty could not have been as high as contended by petitioner because of statutory limitations on the salaries of persons working with the Indians. See the Act of June 30, 1834, 4 Stat. 735. These figures were changed by the Treaty of August 7, 1856, 11 Stat. 699, necessitating a division of obligations under this Treaty into pre-1856 obligations and post-1856 obligations. In further defense, the United States pointed out that, in the Treaty of 1856, the Creek Nation reserved its right to future and

continued payment for education and services under the Treaty of 1833, but it did not reserve any claim to sums unpaid, any right to the value of services not performed, or any claim to damages for failure to perform the services prior to August 7, 1856. Moreover, according to the government's evidence, the obligations which the 1856 Treaty continued were assumed and paid by the Confederacy. Finally, the government claimed credit for the amounts appropriated pursuant to the 1833 Treaty and disbursed for the relief of refugee Creeks during the Civil War.

With respect to the 1833 Treaty, the Indian Claims Commission found (R. 271–272):

> There is no proof in the record as to any pecuniary loss suffered by the petitioner, nor as to the need of services of blacksmiths or other equipment which the treaty obligated the defendant to provide, nor is there any evidence of any demand having been made by petitioner for services or equipment not supplied.

4. THE TREATY OF 1856

Petitioner's fifth claim is based on the following provision of Article VI of the Treaty of August 7, 1856, 11 Stat. 699, 701 (App. A, *infra*, pp. 53–55):

> * * * [T]he United States do hereby agree and stipulate to allow and pay the Creek Nation the sum of one million of dollars, which shall be invested and paid as follows, viz: two hundred thousand dollars to be invested in some safe stocks, paying an interest of at least five per cent. per annum; which interest shall be regularly and faithfully applied to purposes of education among the Creeks * * *.

Petitioner's claim under this provision was for the period from 1857 through 1861 (R. 6). It claimed that, although Congress had appropriated $10,000 for each of these years (R. 137–138), the G.A.O. Report showed disbursements of only $21,000 of that $50,000 (R. 103), and that therefore the alleged deficit was $29,000.00.

In its defense against this claim, the United States again relied on payments made during the Civil War by both the Confederacy and the United States. The $29,000 deficit was one of the obligations specifically assumed by the Confederacy in its treaty with the Creeks (C.S.A., Provisional Government, Stats. (1861–1862), pp. 289, 297–299 (Def. Ex. 159, R. 256–257)). The Confederacy appropriated this money (Def. Ex. 160, R. 257) and paid it (Def. Exs. 167, 168, 169, 170, 173, R. 258–263). Moreover, the United States continued to appropriate the $10,000 a year throughout the Civil War, and these appropriations were disbursed for refugee Indians (R. 33–34).

In its finding on the 1856 Treaty, the Indian Claims Commission concluded (R. 272):

> The Confederate States paid the $29,000 and plaintiff accepted the same. (Dft's Ex. 160, p. 232; Dft's Ex. 166–170, 173).
>
> The United States Congress also approved the payment of the $29,000 involved in this claim for the benefit of Indians remaining loyal to the United States during the Civil War, which expenditure the plaintiff approved and ratified in the Treaty of June 14, 1866 (14 Stat. 785, 790).

SUMMARY OF ARGUMENT

I

A. Petitioner bases its claims on the theory that a general fiduciary relationship exists between the United States and the Creek Nation resembling that of a guardian to its ward, and that under such relationship the burden is on the United States, when its performance of treaty obligations is questioned, affirmatively to establish that it has fulfilled such obligations. Whether or not the relationship of guardian and ward exists between the two parties, however, depends upon the express provisions of the particular treaties or acts under which the claims are brought, and not upon any general fiduciary principle. In *Creek Nation* v. *United States*, 318 U.S. 629, petitioner brought its claims on the same theory it invokes in the present case, but the Court refused to impose upon the United States the duties of a guardian in relation to treaties which did not impose that obligation.

B. Congress intended the Indian Claims Commission to determine claims on the basis of the specific relationship created by the treaties under which the claims are brought and not on the basis of a general fiduciary relationship. Despite opposition, the House passed the Indian Claims Commission bill with a provision which required the Commission, when determining claims, to apply the same principles of law as would be applied to an ordinary fiduciary. Opposition to this provision was renewed when the measure was before the Senate, and the latter eliminated the provision from the bill, on the ground that the Commission should determine the degree of fiduciary duty on

a case-to-case basis. As finally passed, the bill did not contain the fiduciary provision.

C. In the present case, the Indian Claims Commission properly determined petitioner's claims on the basis of the specific relationship established by the five treaties under which petitioner brought its claims. None of those treaties created fiduciary duties or relationships by their express terms. The Commission correctly found that the relationship created was not one of guardian and ward, but rather that of creditor and debtor. The burden was therefore on petitioner to prove its claims.

II

Whether or not a guardian-ward relationship existed between the United States and the Creek Nation, the legislative history of the Indian Claims Commission Act indicates clearly that Congress never intended to impose upon the United States the heavy burden of proof which petitioner contends is mandatory; it rather intended that Indian tribes prove their claims. Congress was fully aware of the difficult evidentiary problems resulting from the age of most Indian claims and the deterioration of the government's old Indian records. It therefore hardly intended the United States to assume the burden of having its eighteenth and nineteenth century transactions tested by twentieth century accounting standards. The onerous standards of accountability which petitioner seeks to impose upon the United States have never been applied by this Court. The burden, in the last analysis, rests upon petitioner to prove its claims. Petitioner here failed to sustain that burden.

ARGUMENT

INTRODUCTION

The petitioner seeks to recover amounts which the government was obligated to pay under five treaties (all more than 100 years old), but which the government allegedly failed to pay. The theory of petitioner's case is that the relationship between an Indian tribe and the United States is that of ward and guardian; that, under such relationship the burden is on the United States, whenever it is claimed that the latter has failed to perform its treaty obligations, to prove affirmatively that it has done so; and that the government has here failed to sustain that burden because the records of payments to the tribe did not specifically show the allocation of all of the payments to particular treaty obligations. Petitioner seeks to recover the difference between the total treaty obligations and the total payments which were specifically allocated to such obligations.

Petitioner's argument rests on a basic misconception. The relationship between an Indian tribe and the United States is frequently described loosely as that of ward and guardian. But the determination of whether, and to what extent, the government has assumed fiduciary duties with respect to particular claims depends upon the particular treaties and statutes under which those claims arise. In the present case, the five treaties under which petitioner's claims are asserted did not create any relationship of guardian and ward between the United States and the petitioner with respect to the subject matter of such

claims. The Indian Claims Commission thus correctly ruled that, as to such claims, the relationship between the United States and the petitioner was merely that of debtor and creditor, and that petitioner's failure to sustain its burden of proof that the United States had not made the payments required by the treaties was fatal to its case.

I

THE TREATIES UNDER WHICH PETITIONER BROUGHT ITS CLAIMS DO NOT CREATE A GUARDIAN-WARD RELATIONSHIP BETWEEN THE PARTIES BY VIRTUE OF WHICH THE UNITED STATES HAS THE BURDEN OF MAKING A PRECISE ACCOUNTING FOR TREATY OBLIGATIONS OVER A CENTURY OLD

A. WHETHER OR NOT THE RELATIONSHIP OF GUARDIAN AND WARD EXISTS BETWEEN THE UNITED STATES AND AN INDIAN TRIBE DEPENDS UPON THE EXPRESS TREATY PROVISIONS APPLICABLE TO EACH TRANSACTION AND NOT UPON A GENERAL FIDUCIARY PRINCIPLE

Petitioner's case rests on an uncritical application of the general principle that "a fiduciary relationship does in fact exist between the United States and the Indian tribes, the Creek Nation in this case, and that this relationship resembles that of guardian and ward" (Pet. Br. 41). From this principle, petitioner draws the conclusion that "the United States, as the fiduciary, has the burden of making a clear and precise accounting to petitioner for the payments it made under its treaty obligations * * *" (Pet. Br. 51–52), and "ha[s] the burden of proving the credits it claim[s] against the specific balances shown by its own accounting report to be due the Creek Nation under the treaty obligations in issue" (Pet. Br. 54).

To state that a general fiduciary relationship exists between the United States and the Indian tribes in the nature of guardian to ward, however, does not automatically answer the specific question whether the Creek Nation is entitled to judgment. It will hardly do to assimilate the "ward" status of an Indian tribe to the status of ward at common law or to make it synonymous with the status of a "cestui que trust." See Felix S. Cohen, *Handbook of Federal Indian Law*, pp. 169, 172 (1942). Although an Indian tribe in its relationship to the United States resembles a ward in its relationship to its guardian in the political context of the tribe as a "domestic dependent nation * * * in a state of pupilage" (*Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17; see *United States* v. *Kagama*, 118 U.S. 375; *United States* v. *Payne*, 264 U.S. 446; Cohen, *supra*, p. 170), in other contexts, "wardship" may have a variety of connotations (see *id.* at 170–173).

The decisive factor in each case is not what effect the general fiduciary relationship of the United States as guardian to the Indian tribes has, but rather what effect the specific relationship of the two parties, as created by the specific treaty or act, has to the claim presented. In *Creek Nation* v. *United States*, 318 U.S. 629, petitioner brought its claims on the same guardian-ward theory it invokes in the present case, but the Court refused to impose upon the United States the duties of a guardian in relation to treaties which did not themselves impose that obligation. The Court determined the nature and extent of the government's duties to the tribe on the basis of the

particular relevant transactions. The Court stated (*id.* at 640):

> We are asked here to impose a liability on the government to these Indians for wrongs allegedly committed against the Indians by others. Appreciating the desire of Congress to recognize the "full obligation of this nation to protect the interests of a dependent people," *Tulee* v. *Washington*, 315 U.S. 681, 685, we are unable to find in the words of the treaties or statutes upon which this action rests any such prodigal assumption by the government of other people's liabilities as that for which the petitioners contend here.[7]

Similarly, in *Skokomish Indian Tribe* v. *France*, 269 F. 2d 555, 560, the Ninth Circuit stated: "The Federal-Indian relationship has many times been said to resemble that of guardian and ward. However, in the absence of some specific language to that effect in the treaty, the legal obligations of a true guardianship do not prevail." The Court of Claims has also rejected the "guardian-ward" theory as a general principle. In *Gila River Pima-Maricopa Indian Community* v. *United States*, 140 F. Supp. 776, 780 (C. Cls.), the court noted that "[w]hether or not the legal relationship of guardian and ward exists between a particular Indian tribe and the United States depends * * * upon the express provisions of the particular treaty * * * under which the claim presented arises." This principle was graphically

[7] It is noteworthy that the reliance on the *Creek Nation* case in the dissenting opinion below (R. 302, fn. 6) is in reality a reliance on Justice Murphy's dissent in *Creek Nation*, 318 U.S. at 642.

illustrated in *Choctaw and Chickasaw Nations* v. *United States*, 75 C. Cls. 494, 498–499, where the court explained:

> * * * [P]laintiffs' cause of action is predicated upon the common law liabilities pertaining to the relationship of guardian and ward. No treaty or act of Congress is cited wherein the Government assumed liabilities of the character claimed in positive language, and the court must deduce liability from the relationship of the parties if judgment is awarded, and not from treaties or acts of Congress.
>
> * * * * *
>
> The Congress has, in innumerable special acts * * *, limited the jurisdiction of the court to the ascertainment of the legal liability of the Government * * *, and no precedent exists which would authorize the court to extend the meaning of the terms used so as to comprehend a right to sue thereunder on the theory that as a matter of general law the Government because of treaties and acts of Congress becomes responsible as guardian of the Indians. * * *

Accord, *Kansas or Kaw Indians* v. *United States*, 80 C. Cls. 264, 301–302, certiorari denied, 296 U.S. 577; *Sioux Tribe of Indians* v. *United States*, 146 F. Supp. 229, 237 (C. Cls.).

From these cases, it is evident that the courts have referred to what Congress has done, both in entering into agreements with the Indians and in carrying them out, in order to determine the exact relationship between the United States and the Indian tribe in any given situation, rather than determine the relationship on the basis of a general all-embracing principle. In each case "it rests with Congress to determine when and in what manner the special relationship

* * * [*e.g.*, "guardianship" or "trusteeship"] shall attach, and when it shall cease." United States Department of the Interior, *Federal Indian Law*, p. 557 (1958).

B. CONGRESS INTENDED THE INDIAN CLAIMS COMMISSION TO DETERMINE CLAIMS ON THE BASIS OF THE SPECIFIC RELATIONSHIP CREATED BY THE TREATIES UNDER WHICH THE CLAIMS ARE BROUGHT AND NOT ON THE BASIS OF A GENERAL FIDUCIARY RELATIONSHIP

The legislative history of the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. 70–70v, indicates that Congress did not intend the Commission to determine claims on the basis of any general fiduciary relationship between the United States and the Indian tribes; rather the Commission was to determine in each particular case whether the United States was under a specific fiduciary duty to each plaintiff, and, if so, what the extent of that duty was.

1. In March 1945, the House Committee on Indian Affairs began hearings on two bills to create an Indian Claims Commission. Neither bill made reference to any guardian-ward or fiduciary relationship between the United States and the Indian tribes. See Hearings on H.R. 1198 and 1341 before the House Committee on Indian Affairs, 79th Cong., 1st Sess., pp. 1–8. Although there were occasional references throughout the hearings to such a relationship (*id.* at pp. 13, 26, 31–32, 86), there was no effort to define it.

Joseph C. McCaskill, Assistant Commissioner of the Bureau of Indian Affairs, testified (*id.* at p. 74) that a jurisdictional act for the Menominees (probably

the Act of Sept. 3, 1935, Sec. 3, 49 Stat. 1085*) directed the Court of Claims "to apply to the Government the same standards of performance that would apply to a trustee," and assumed that each proposed bill "is flexible enough that the Commission might if it wished apply such standards and demand of the Government the same kind of performance that it would require of a private trustee." At a later session, Mr. Ernest L. Wilkinson, representing several tribes, recommended as an amendment to Section 2 of each bill (Hearings on H.R. 1198 and 1341, *supra* p. 89), that "in the determination of any case prosecuted hereunder, the United States shall be held to the same standards of care as an ordinary fiduciary." Moreover, when the Department of the Interior submitted its proposed amendments to the two bills, it added the following clause to Section 2 of each bill (*id.* at p. 116): "The Commission, in determining whether a claimant is entitled to relief on legal grounds, shall apply with respect to the United States the same principles of law as would be applied to an ordinary fiduciary." In the discussion of the Department's proposals, it was noted that the Department's and Mr. Wilkinson's recommendations on the fiduciary clause were practically the same (*id.* at p. 128).

2. Ultimately, a new bill (H.R. 4497, 79th Cong., 1st Sess.), embodying many suggestions including the fiduciary provision proposed by the Department of

**Menominee Tribe* v. *United States*, 101 C. Cls. 10, and *Menominee Tribe of Indians* v. *United States*, 102 C. Cls. 355, relied on in the dissenting opinion below (R. 302, fn. 6, R. 303), were suits brought under this jurisdictional act.

the Interior, was reported to the House in December 1945. H. Rep. No. 1466, 79th Cong., 1st Sess. The report explained the greatly varied nature of Indian claims and the desirability and necessity of having a tribunal which could adjudicate them (*id.* at p. 4). The Committee found no reason to deny the Indians a forum to determine whether the United States had fulfilled its obligations to them even though the claims dated back many years, for, as the Committee stated (*id.* at p. 5): "If we fail to meet these obligations by denying access to the courts when trust funds have been improperly dissipated or other fiduciary duties have been violated, we compromise the national honor of the United States." Subsequently, in discussing the Commission's jurisdiction under the sixth classification of claims allowed under the bill, namely (*id.* at p. 10), "claims of whatever nature which would arise on a basis of fair and honorable dealings, even though not recognized by any existing rule of law or equity," the Committee stated (*id.* at p. 12):

> * * * This extension of jurisdiction is believed to be justified by reason of the fact that we have always treated the Indian tribes as non sui juris and have set ourselves up as their guardians. In this relationship many claims, not strictly legal, but meritorious in character have developed, which the Congress has recognized in a few special jurisdictional acts * * *.

3. Opposition to the general fiduciary provision developed during the House debate on the bill. See 92 Cong. Rec. 5309–5323. Letters from the Comptroller General and the Attorney General, both of whom op-

posed its passage, were inserted in the Congressional Record (*id.* at 5309–5311). The Comptroller General referred to the fiduciary provision as objectionable (*id.* at 5310). Attorney General Clark spelled out his objections to the fiduciary provision (*id.* at 5311):

> * * * The justification for such a provision is not apparent, for if the claim is one based upon legal grounds the Commission ought to determine, according to principles of law, just what fiduciary duty, if any, existed with respect to the claim against the United States and not be compelled to treat the United States as an ordinary fiduciary when it was in fact under no such duty.

The House never specifically considered the objections and passed the bill with the fiduciary provision.

4. The Department of Justice, in testimony by Mr. J. Edward Williams and written comments by Attorney General Clark, renewed its objection to the general fiduciary provision in the Senate Hearings on the bill. See Hearings on H.R. 4497 before the Senate Committee on Indian Affairs, 79th Cong., 2d Sess., pp. 17, 26. The Senate Committee eliminated the fiduciary provision. See S. Rep. No. 1715, 79th Cong., 2d Sess. Attorney General Clark's letter was printed as part of the Senate Committee report. The Senate accepted the Committee's amendments and passed the bill as amended. See 92 Cong. Rec. 9217–9219.

In conference, the House managers agreed to the elimination of the fiduciary provision. See H. Rep. No. 2693, 79th Cong., 2d Sess. The House managers in their report explained that the conferees had

"agreed to the elimination of this [fiduciary] provision because it is now well settled that without express language the United States owes a very high degree of fiduciary duty to Indian tribes * * *" (*id.* at p. 6).[9]

The Senate Committee in its report had stated as its reason for eliminating the fiduciary provision that "the Commission should be permitted to determine according to the usual principles of law whether the Government was a fiduciary in the particular case involved, and if so what fiduciary duties were imposed upon it." S. Rep. No. 1715, *supra*, p. 6.

C. THE RELATIONSHIP BETWEEN THE PARTIES UNDER THE TREATIES INVOLVED IN THE PRESENT CASE WAS MORE AKIN TO CREDITOR AND DEBTOR THAN TO GUARDIAN AND WARD

In the present case, the Indian Claims Commission, pursuant to its statutory mandate, properly determined petitioner's claims, not on the basis of any general fiduciary relationship between the parties, but

[9] The conferees also cited Section 24 of the bill which provided "[t]hat nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, bands, or groups." H. Rep. No. 2693, *supra*, p. 6. Section 24, although not part of the original bills, was a part of the bill which passed the House; the Senate did not amend it. Section 24 provides for suits on Indian claims arising after the cut-off date for suits pursuant to Section 2 (*supra*, pp. 2–4). By the Act of May 24, 1949, 63 Stat. 102, Section 24 was transferred to the Judicial Code as 28 U.S.C. 1505. The proviso quoted above was "omitted as unnecessary since the provision conferring jurisdiction cannot in any view alter the relationship of the Government with its Indians." H. Rep. 352, 81st Cong., 1st Sess., p. 15; see 28 U.S.C.A. 1505.

on the basis of the specific relationship established by the five treaties under which petitioner brought its claims. In alleging that the United States must make an accurate and precise accounting to petitioner of all the disbursements made pursuant to treaty obligations (Pet. Br. 51–52), petitioner attempted to use Article II of the Treaty of August 7, 1790, 7 Stat. 35, under which the Creek Nation acknowledged itself "to be under the protection of the United States of America" (Pet. Br. 42, fn.), as a basis for alleging that a guardian-ward relationship existed between the two parties in the present case (see R. 277, 280). But, as the Commission pointed out, petitioner made no claim under the 1790 Treaty (R. 280), and under the principle established in *Creek Nation* v. *United States, supra,* 318 U.S. at 640, any fiduciary relationship between the United States and the Indian tribe must be created by the specific treaty under which the claim is asserted.

Petitioner asserted that the treaties under which it was suing had created a fiduciary relationship and had set up trust funds which were to be held and administered by the United States for the use and benefit of the Creek Nation (R. 2, par. III; see R. 274). But none of the five treaty provisions upon which petitioner has based the present suit creates fiduciary relationships or duties by its express terms. Moreover, the obligations which petitioner claimed were unfulfilled were to be paid out of public funds rather than Indian trust funds. None of the provisions in the first four treaties (of 1802, 1805, 1832, and 1833) ever created a trust fund or segregated

any portion of the public moneys for use on petitioner's behalf. In fact, only the Treaties of 1805 and 1832 fixed definite limits to the government's obligations which would have made such a segregation of funds possible. Instead of creating trusts, the treaties imposed upon the United States simple contractual obligations to make certain payments to petitioner. Cf. *Quick Bear* v. *Leupp,* 210 U.S. 50, 81 (referring to treaty obligations as debts).

The only claim involved in this case which could be said to be related to a trust fund is that under the Treaty of 1856 (App. A, *infra,* p. 53), in which the United States agreed to invest $200,000 "in some safe stocks, paying an interest of at least five per cent. per annum; which interest shall be regularly and faithfully applied to purposes of education among the Creeks * * *." It is not clear from the record that $200,000 was ever used to purchase stocks, but this amount was included in the $999,368 appropriated by the Act of May 27, 1902, 32 Stat. 245, as commutation of the annuities due the Creek Nation (R. 98).[20] Be that as it may, petitioner's claim here concerns only the interest which the United States guaranteed would be paid. Since the government cannot guarantee that particular investments it may make will return a hoped-for rate of interest, the treaty obviously contemplated that the government would make up any difference between the

[20] The first full paragraph on R. 98 refers to an appropriation of $200,000 plus interest due under Article VI of the 1856 Treaty. This appropriation was to fulfill another provision of the article involved here.

actual return and the five percent out of public funds, and in fact the United States made annual appropriations for the full amount of the interest (R. 98, 137–138).[11] The interest obligation was therefore a simple debt. In any event, this obligation had been fully discharged (Fdg. 8, R. 272), so that speculation as to its nature is purely academic.

With respect to all the claims, the Commission noted, in examining petitioner's allegations, proposed findings and prayer (R. 274–277), that petitioner had consistently referred to "obligations," "indebtedness," and amounts "due and owing," rather than to "moneys it had received from or for the plaintiff, the management of which the defendant became trustee" (R. 274). Consequently, petitioner's suit was not for an accounting of the disposition of trust funds or for the breach of fiduciary duties, but rather involved the "relationship of ordinary debtor and creditor" (R. 280). The Indian Claims Commission was therefore correct in finding that "[t]he relation of guardian and ward as between the plaintiff and the defendant has not been established by competent or relevant evidence" (Fdg. 3, R. 265), and that the burden was on petitioner to prove its claims (see R. 277).

[11] The appropriations list on R. 138 is not complete because petitioner's claim applied only to deficits alleged to have occurred in the first few years after the treaty was entered.

II

CONGRESS INTENDED THAT, UNDER THE INDIAN CLAIMS COMMISSION ACT, THE BURDEN WOULD BE ON AN INDIAN TRIBE TO PROVE ITS CLAIMS; PETITIONER FAILED TO SUSTAIN THAT BURDEN

1. Whatever substantive fiduciary obligation the United States may have either by general principle or under the specific treaties involved in the present case, that obligation does not shift the burden to the United States to prove that it made specific disbursements to meet specific treaty obligations. The soundness of this proposition is demonstrated by the legislative history of the Indian Claims Commission Act.

The Indian Claims Commission bill as it passed the House had specified six classifications of claims which could be brought under it. The Senate had eliminated three of the classifications, but the conferees had reinserted two of those three (H. Rep. No. 2693, 79th Cong., 2d Sess., pp. 5–6)—

> * * * because they wanted to make sure that *if any tribal claimant could prove facts sufficient to make a case* under either of these classifications, the Commission would have authority to make an award to such claimant.
>
> * * * The reinsertion of this classification makes it plain that *where claimant can prove sufficient facts* within the language of this classification the Commission had full authority to award proper damages therefor. [Emphasis added.]

There is no reason to believe that this statement on the burden of proof under two of the classifications did not apply to the other classifications ultimately em-

bodied in the Act (see Section 2 of the Act, 25 U.S.C. 70a, *supra*, pp. 2–4).[12]

Moreover, when Congress created the Indian Claims Commission, it was fully aware of the difficult evidentiary problems which would confront the parties to suits before the Commission. The General Accounting Office had already made up a number of reports of the kind involved in the present case,[13] and the Department of the Interior had given the House Committee on Indian Affairs a list of over 150 suits in which G.A.O. reports had been submitted. See Hearings on H.R. 1198 and 1341 before the House Committee on Indian Affairs, 79th Cong., 1st Sess., pp. 166–175. One proponent of the bill stated that, in the preceding twenty years, the General Accounting Office had spent over $1,000,000 in reporting on Indian claims bills. 92 Cong. Rec. 5316. Secretary of the Interior Ickes explained why these reports

---

[12] The two classifications of claims reinserted by the conferees were clauses 3 and 4 of Section 2 of the Act involving the revision of agreements and takings of land without payment of compensation. The present suit falls under clause 1, involving "claims in law or equity arising under * * * treaties of the United States * * *."

[13] In *Miami Tribe of Oklahoma* v. *United States*, 9 Ind. Cl. Comm. 580, 590, the Commission stated:

> We take judicial notice of the fact that at the present time, and for many years in the past, a whole section of the General Accounting Office staff consisting of approximately 80 persons has been and is now working on Indian Claims accounting made necessary by the Indian Claims Commission Act and previous jurisdictional acts authorizing the Court of Claims to adjudicate certain specific Indian claims against the United States. * * *

were so expensive (S. Rep. No. 1715, 79th Cong., 2d Sess., p. 3):

> At present, after long preliminary negotiation and lobbying, eventuating in a jurisdictional act, a petition is filed in the Court of Claims, and the General Accounting Office goes through all records of expenditures, accumulating as certain or possible set-offs the detailed record of all the gratuitous expenditures for or in behalf of each tribe. The Indian Office, simultaneously or subsequently, prepares a lengthy history and discussion of the case. While the General Accounting Office is working on one case, many others are waiting their turn because much of the data are contained only in a single, unduplicated series of badly worn-out records.

It was generally realized that many of the claims brought under the Act would be old.[34] But the House Committee stated that "even if there are some claims that have roots in 80- or 90-year old treaties, it is hard to understand why their age should deprive the aggrieved Indians of appropriate relief." H. Rep. No. 1466, 79th Cong., 1st Sess., p. 5.

Since Congress was aware of the age of most Indian claims and the deterioration of the government's old Indian records, it hardly intended the United States to assume the burden of having its eighteenth and nineteenth century transactions tested by

[34] Some Congressmen apparently did not realize just how old some claims would be, for there was some discussion of trying to adjudicate claims before the death of those Indians who had first-hand information and evidence. See Hearings on H.R. 1198 and 1341, *supra*, p. 28.

twentieth century accounting standards. Accounts kept by a semi-literate agent, writing with a quill by candle-light in a log cabin or tent in Indian country, will never compare to accounts kept on an electronic data-processing and accounting business machine, and there is no reason to believe that Congress thought otherwise. Congress created the Indian Claims Commission as a forum in which Indian tribes could have their claims adjudicated, not as a forum in which the government was simply to confess judgment. If petitioner's standards were to be applied to all past transactions, claimants would have nothing to do to recover but point out discrepancies in General Accounting Office reports; the government would be able to do nothing but admit liability.

In *Seminole Nation* v. *United States*, 316 U.S. 286, the Court refused to allow the Indians to recover on the ground of a technical accounting deficiency. In Item Three in that case, the tribe sought to recover money intended for the support of schools which had been promised in a treaty identical with the Treaty of 1856 in the present case. The Court held (316 U.S. at 292) that, since the Tribal Treasurer had annually disbursed more than enough to meet the obligation, "there is no need to inquire whether payment to that official was authorized. The schools actually received the benefit of the money. That satisfied the obligation of the Treaty and defeats recovery."

In *Miami Tribe of Oklahoma* v. *United States*, 9 Ind. Cl. Comm. 580, the plaintiff carried the theory of a right to a "general accounting" to its logical conclusion by, in effect, "demanding that the defendant,

in addition to making an accounting of all financial or monetary transactions connected with, or growing out of said treaties and statutes, search its files and records and furnish to the petitioners factual evidence which will enable them to state causes of action against it and prosecute them to a successful conclusion" (*id.* at 588). The Commission rejected the demand. After pointing out that 11 General Accounting Office reports had already been made and that Section 14 of the Indian Claims Commission Act, 25 U.S.C. 70m, provided in effect a discovery process of all evidence in the government file, the Commission concluded (*id.* at 590):

> That the work before this Commission is adversary in nature to a large extent and was so intended by Congress, is evidenced by the legislative history of the Act. General principles of law apply as is shown by the refusal of Congress to incorporate into the Indian Claims Commission Act a provision holding the Government to the strictest of fiduciary standards in every instance coming before us. Only where such standards are applicable under the general law and in a case where the facts justify it do they apply. Except to the express extent of making all records and data available to petitioners, we think the defendant owes the petitioners no greater duty in the preparation and presentation of their case than it would if the parties were ordinary litigants in any court of law.
>
> To hold otherwise would place upon the defendant an additional and unprecedented burden to the heavy one it now bears. * * *

2. Whatever may be the fiduciary relationship between the parties, the burden was in fact upon petitioner to prove its case. The onerous standards of accountability which petitioner seeks to impose upon the United States have never been applied by this Court. Rather, the Court has fashioned practicable solutions that would achieve a fair adjustment of the equities of a particular case.

An illustrative example is *Choctaw Nation* v. *United States,* 119 U.S. 1. There the Senate, under the provisions of a treaty, made an award to the Choctaw Nation to cover lands which the latter had lost because of the government's failure to adhere to a prior treaty with the Choctaws. In a subsequent suit by the Choctaw Nation against the United States, the Court of Claims treated the Senate award as of no effect, and granted the Choctaws a different amount. This Court, however, upheld and approved the award made by the Senate. Both it and the Senate recognized that the Choctaws were not receiving the same amount as they would have received had they sold the lands themselves, but the Court stated (119 U.S. at 35 (emphasis added)) that "the principle of settlement adjudged by the Senate in its award * * * furnishes the nearest approximation to the justice and right of the case that, *after this lapse of time,* it is practicable for a judicial tribunal to reach."

In the *Choctaw* case, the "lapse of time" was in fact relatively short. When the Senate passed its resolution in 1859 making the award, the first Choctaw treaty in question was not yet 40 years old, the main Choctaw treaty in question was not yet 30 years old,

and the last Choctaw treaty in question was only four years old. In the present case, more than a century later, petitioner adamantly ignores all practicalities of proof in connection with its claims, two of which even antedate the Choctow claims. If the standard in the *Choctaw* case was to be a practicable one rather than one imposing impossible criteria of accountability, surely the standard in the present case must at least be equally practicable.

Such a practicable standard was laid down in *Chickasaw Nation* v. *United States*, 103 C. Cls. 1, reversed on other grounds, 326 U.S. 217.[15] In that case, the first claim was that the United States had failed to fulfill a treaty obligation to pay an annuity of $3,000. In holding that the Chickasaws were not entitled to recover, the court found that Congress had made appropriations for the years in question and that goods of the right value had been forwarded from the War Department storehouse for the Chickasaws. The court held (103 C. Cls. at 35–36):

> * * * It must be presumed that they were received in due course. To require the defendant to prove affirmatively that the goods were received (the proof at this late date would have to be documentary) would place an impossible burden where it does not rightfully belong. The burden is upon the plaintiff to prove its case. While the jurisdictional act waives the "lapse of time," it does not thereby

[15] The fact that the Commission erroneously stated the effect of the denial of certiorari on one point (see R. 278–281) does not detract from the principle laid down by the Court of Claims in the *Chickasaw* case.

> shift the burden of proof to the defendant, nor does the jurisdictional act by its terms excuse the absence of proof by the plaintiff.
>
> It must also be presumed that the goods forwarded were paid for out of the appropriations made in fulfillment of the supposed treaty or agreement. The Government's accounts are not complete in that respect, but it may not be assumed that the Government paid for the goods without appropriation. Counsel do not invite attention to any other appropriations.

Similarly, under the circumstances of the present case, petitioner had the burden of proving its claims, but failed to do so. The General Accounting Office Report showed all the financial facts, and the government offered other supporting material from the National Archives, from printed compilations of government documents, and from texts on Indian history. Indeed, petitioner presumably would never even have filed its claims had it not been for the availability of the G.A.O. Report. Moreover, Section 14 of the Indians Claims Commission Act allowed petitioner "full and free access to such letters, papers, documents, maps, or records as may be useful * * * in the preparation of any claim instituted under this Act * * *."[18] Yet petitioner offered practically no countervailing evidence relating to its claims; it simply criticized

[18] Since all the pertinent data were equally available to both parties, petitioner has no basis for alleging (Pet. Br. 60-61) that the burden of proof was on the government because the subject matter of the negative averment of nonpayment lay peculiarly within the knowledge of the government.

the government's proof for not being absolutely decisive and failed to controvert the abundant evidence produced by the United States on all contested issues.

(*a*) With respect to the Treaties of 1802 and 1805 (see the Statement, *supra*, pp. 8–11), petitioner claimed a combined deficit of $98,857.50. The G.A.O. Report showed (R. 23–24, 127–128), and the Indian Claims Commission found (R. 267–268), that additional money and goods had been disbursed to the Creek Nation between 1803 and 1818 "which the General Accounting Office cannot definitely and clearly identify as having been disbursements in fulfillment of the obligations of the Treaty of 1802 or 1805." The Commission further found that these unallocated disbursements totaled $99,461.45 and therefore exceeded the amounts claimed by petitioners under the two treaties (R. 269).

Petitioner alleges here (Pet. Br. 13) that the G.A.O. Report failed to take into account all the obligations of the Treaty of 1790, and that the Indian Claims Commission failed to consider possible obligations under that Treaty (Pet. Br. 16). But the G.A.O. Report says of the list of goods sent out between 1800 and 1809 (R. 24): "It appears, however, that portions of said amounts were in fulfillment of treaties with said Indians subsequent to the aforesaid Treaty of 1790, as the value of the goods furnished said Indians during the years indicated was in excess of the $1,500 annuity due said Indians under said treaty." As for the possibility of attributing the unallocated disbursements to payments to the medal

chiefs and to Alexander McGillivray (Pet. Br. 12–13), it is not at all clear that anything was due them at the time of the unallocated payments in question. McGillivray, for one, had died in 1793 (R. 199), ten years prior to the first of the payments in question.

(*b*) The evidence on the Treaty of 1832 is narrated in detail in the Statement, *supra*, pp. 11–15. Although petitioner insisted, as it does in this Court (Pet. Br. 19–20; see R. 286, par. 12), that the Treaty of 1845 was irrelevant and immaterial to its claim under the 1832 Treaty and that the Commission erred in mentioning it, it is clear that the Commission correctly considered (R. 270) payments under the 1845 Treaty as directly attributable to the 1832 obligations (see App. C, *infra*, p. 63; the Statement, *supra*, pp. 12–13). Instead of offering evidence of its own, petitioner attempted to exclude consideration of the 1845 Treaty which established payment of the obligations under both treaties. Moreover, petitioner did not refute the government's evidence that during the Civil War the Confederacy had assumed obligations of the United States to the Creek Nation and had in fact paid those federal obligations and that also during that war the United States had made payments for the relief of refugee Indians (see the Statement, *supra*, pp. 12–14).

(*c*) The evidence relating to the government's obligation to furnish a blacksmith and wheelwright under the Treaty of 1833 affords a good example of petitioner's failure to offset the government's proof. The government pointed to statutory limitations on the salaries which could be paid craftsmen. See the Act of June 30, 1834, 4 Stat. 735. Petitioner, with-

out attempting to show that it had needed a blacksmith and wheelwright, claimed that they were worth $1,710 a year (see Br. 21–22), but made no attempt to explain the sums shown to have been disbursed to pay blacksmiths and wagonwrights, which were less than $1,710 a year, before an amount was fixed for them in 1856 (Disbursement Schedules 75 and 76, R. 75–83). Rather, petitioner again chose to rely on its own peculiar reading of the G.A.O. Report instead of coming forward with evidence to support its allegations. (See the Statement, *supra*, pp. 15–18.) Moreover, the government pointed out (see the Statement, *supra*, p. 17) that the Treaty of 1833 did not define the amount or term of the government's obligation. Commencement of the services of the artisans was wholly conditional upon petitioner's need; the educational allowance was wholly in the discretion of the President; and both were to continue only so long as the President saw fit to continue them.

(*d*) With respect to the claim under the Treaty of 1856, nothing need be added to what has already been said (see *supra*, pp. 33–34; the Statement, *supra*, pp. 18–19) other than that the Commission found that the obligation had been fulfilled (R. 272).

In view of the failure of petitioner affirmatively to establish its case and to controvert the evidence produced by the United States, the Commission was fully justified in finding that "[t]here is not sufficient evidence in the record to show that any of the indebtedness claimed by the plaintiff has not been discharged" (Fdg. 10, R. 273).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

RICHARD J. MEDALIE,
Assistant to the Solicitor General.

ROGER P. MARQUIS,
RALPH A. BARNEY,
HUGH NUGENT,
Attorneys.

APRIL 1962.

APPENDIX A

Treaty Provisions

1. THE TREATY OF 1802

By Article I of the Treaty of June 16, 1802, 7 Stat. 68, between the United States and the Creek Nation, the Creek Nation ceded certain lands to the United States. Article II of the Treaty reads as follows:

> The commissioners of the United States, for and in consideration of the foregoing concession on the part of the Creek nation, and in full satisfaction for the same do hereby covenant and agree with the said nation, in behalf of the United States, that the said states shall pay to the said nation, annually, and every year, the sum of three thousand dollars, and one thousand dollars for the term of ten years, to the chiefs who administer the government, agreeably to a certificate under the hands and seals of the commissioners of the United States, of this date, and also twenty-five thousand dollars in the manner and form following, viz. Ten thousand dollars in goods and merchandize, the receipt of which is hereby acknowledged; ten thousand dollars to satisfy certain debts due from Indians and white persons of the Creek country to the factory of the United States; the said debts, after the payment aforesaid, to become the right and property of the Creek nation, and to be recovered for their use in such way and manner as the President of the United States may think proper to direct; five thousand dollars to satisfy claims for property taken by individuals of the said nation, from the citizens of the United States, subsequent to

the treaty of Colerain, which has been or may be claimed and established agreeably to the provisions of the act for regulating trade and intercourse with the Indian tribes, and to preserve peace on the frontiers. And it is further agreed that the United States shall furnish to the said nation two sets of blacksmiths tools and men to work them, for the term of three years.

2. THE TREATY OF 1805

In the Treaty of November 14, 1805, 7 Stat. 96, the Creek Nation ceded certain lands to the United States and agreed that the United States would thereafter have a right to the use of a road through the Creek country. Article III of the Treaty reads as follows:

> Art. III. It is hereby stipulated and agreed on the part of the United States, as a full consideration for the land ceded by the Creek nation in the first article, as well as by permission granted for a horse path through their country, and the occupancy of the reserved tract, at the old Oemulgee fields, that there shall be paid annually to the Creek nation, by the United States for the term of eight years, twelve thousand dollars in money or goods, and implements of husbandry, at the option of the Creek nation, seasonably signified from time to time, through the agent of the United States, residing with said nation, to the department of war; and eleven thousand dollars shall be paid in like manner, annually, for the term of the ten succeeding years, making in the whole eighteen payments in the course of eighteen years, without interest: The first payment is to be made as soon as practicable after the ratification of this convention by the government of the United States, and each payment shall be made at the reserved tract, on the old Oemulgee fields.

3. THE TREATY OF 1832

In the Treaty of March 24, 1832, 7 Stat. 366, the Creek Nation ceded to the United States all their lands east of the Mississippi River. The United States agreed to survey these lands, and then allow Creek Chiefs and heads of Creek families to select parcels which could be patented to them at the end of five years' occupancy. The United States also agreed to pay certain annuities and claims, and $100,000. Article XI provided: "The land hereby ceded shall remain as a fund from which all the foregoing payments except those in the ninth and tenth articles shall be paid." Article XII of the Treaty expressed the desire of the United States that the Creeks remove to the country west of the Mississippi. For this purpose the United States agreed to pay the expense of removal and to support Creeks for one year after their arrival at their new homes. Article XIII, on which one of the claims in this suit is based, reads as follows:

> Article XIII. There shall also be given to each emigrating warrior a rifle, moulds, wiper and ammunition and to each family one blanket. Three thousand dollars, to be expended as the President may direct, shall be allowed for the term of twenty years for teaching their children. As soon as half their people emigrate, one blacksmith shall be allowed them, and another when two thirds emigrate, together with one ton of iron and two hundred weight of steel annually for each blacksmith. These blacksmiths shall be supported for twenty years.

Article XIV of the Treaty guaranteed the Creeks self-government in their new lands west of the Mississippi.

4. TREATY OF 1833

The Treaty of February 14, 1833, 7 Stat. 417, between the Muskogee or Creek Nation and the United States, established definite boundaries for the lands to be held by the Creeks west of the Mississippi; it provided that these lands were to be the home of the Creeks already there, of those who were still east of the Mississippi, and of the Seminoles as well. Article 5 of this Treaty reads as follows:

> Art. 5. As an evidence of the kind feeling of the United States toward the Muskogee Indians, and as a testimonial of the [their] gratification with the present amicable and satisfactory adjustment of their difficulties with the Cherokees, experienced by the commissioners, they agree on behalf of the United States, to furnish to the Creek Indians west of the Mississippi, one blacksmtih and one wheelwright or wagonmaker, as soon as they may be required by the nation, in addition to those already employed—also, to erect shops and furnish tools for the same, and supply the smith shops with one ton of iron and two hundred and fifty pounds of steel each; and allow the said Creek Indians, annually, for education purposes, the sum of one thousand dollars, to be expended under the direction of the President of the United States—the whole of the above grants to be continued so long as the President may consider them conducive to the interest and welfare of the Creek Indians: And the United States will also cause to be erected, as soon as conveniently can be done, four patent rail way mills, for grinding corn; and will immediately purchase for them twenty-four cross-cut saws. It being distinctly understood, however, that the grants thus made to the Creek Indians, by this article, are intended solely for the use and benefit of

that portion of the Creek nation, who are now settled west of the Mississippi.

5. TREATY OF 1856

In the Treaty of August 7, 1856, 11 Stat. 699, the Creeks ceded part of their lands to the Seminoles, and new boundaries for the Creek lands were set forth. Article V of the Treaty reads as follows:

> Article V. The Creek Indians do hereby, absolutely and forever, quitclaim and relinquish to the United States all their right, title, and interest in and to any lands heretofore owned or claimed by them, whether east or west of the Mississippi River, and any and all claim for or on account of any such lands, except those embraced within the boundaries described in the second article of this agreement; and it doth also, in like manner, release and fully discharge the United States from all other claims and demands whatsoever, which the Creek Nation or any individuals thereof may now have against the United States, excepting only such as are particularly or in terms provided for and secured to them by the provisions of existing treaties and laws; and which are as follows, viz: permanent annuities in money amounting to twenty-four thousand five hundred dollars, secured to them by the fourth article of the treaty of seventh August, seventeen hundred and ninety, the second article of the treaty of June sixteenth, eighteen hundred and two, and the fourth article of the treaty of January twenty-fourth, eighteen hundred and twenty-six; permanent provision for a wheelwright, for a blacksmith and assistant; blacksmith shop and tools, and for iron and steel under the eighth article of the last-mentioned treaty; and costing annually one thousand seven hundred and ten dollars; two thousand dollars per annum, during the pleasure of the President, for assistance in agricultural opera-

tions under the same treaty and article; six thousand dollars per annum for education for seven years, in addition to the estimate for present fiscal year, under the fourth article of the treaty of January fourth, eighteen hundred and forty-five; one thousand dollars per annum during the pleasure of the President, for the same object, under the fifth article of the treaty of February fourteenth, eighteen hundred and thirty-three; services of a wagon maker, blacksmith and assistant, shop and tools, iron and steel, during the pleasure of the President, under the same treaty and article, and costing one thousand seven hundred and ten dollars annually; the last instalment of two thousand two hundred and twenty dollars for two blacksmiths and assistants, shops and tools, and iron and steel, under the thirteenth article of the treaty of March twenty-fourth, eighteen hundred and thirty-two, and which last it is hereby stipulated shall be continued for seven additional years. The following shall also be excepted from the foregoing quitclaim, relinquishment, release, and discharge, viz: the fund created and held in trust for Creek orphans under the second article of the treaty of March twenty-fourth, eighteen hundred and thirty-two; the right of such individuals among the Creeks as have not received it, to the compensation in money provided for by the act of Congress of March third, eighteen hundred and thirty-seven, in lieu of reservations of land to which they were entitled, but which were not secured to them, under the said treaty of eighteen hundred and thirty-two; the right of the reservees under the same treaty, who did not dispose of their reservations to the amounts for which they have been or may be sold by the United States; and the right of such members of the tribe to military bounty lands, as are entitled thereto under existing laws of the United States. The right and interest of the

> Creek Nation and people in and to the matters and things so excepted, shall continue and remain the same as though this convention had never been entered into.

Article VI of the Treaty, upon which one of the claims in this suit is based, reads as follows:

> Article VI. In consideration of the foregoing quitclaim, relinquishment, release, and discharge, and of the cession of a country for the Seminole Indians contained in the first article of this agreement, the United States do hereby agree and stipulate to allow and pay the Creek Nation the sum of one million of dollars, which shall be invested and paid as follows, viz: two hundred thousand dollars to be invested in some safe stocks, paying an interest of at least five per cent. per annum; which interest shall be regularly and faithfully applied to purposes of education among the Creeks; four hundred thousand dollars to be paid *per capita*, under the direction of the general council of the Creek Nation, to the individuals and members of said nation, [1] as soon as practicable after the ratification of this agreement; and two hundred thousand dollars shall be set apart to be appropriated and paid as follows, viz: ten thousand dollars to be equally distributed and paid to those individuals, and their heirs, who, under act of Congress of March third, eighteen hundred and thirty-seven, have received money in lieu of reservations of land to which they were entitled, but which were not secured to them under the treaty of March twenty-fourth, eighteen hundred and thirty-two; one hundred and twenty thousand dollars to be equally and

---

[1] The Senate amended the Treaty by adding at this point these words (11 Stat. 706): "except such portion, as they shall by order of said national council, direct to be paid to the treasurer of said nation for any specified national object, not exceeding ($100,000) one hundred thousand dollars."

justly distributed and paid, under the direction of the general council, to those Creeks, or their descendants, who emigrated west of the Mississippi River prior to said treaty of eighteen hundred and thirty-two, and to be in lieu of and in full compensation for the claims of such Creeks to an allowance equivalent to the reservations granted to the eastern Creeks by that treaty, and seventy thousand dollars for the adjustment and final settlement of such other claims of individual Creek Indians, as may be found to be equitable and just by the general council of the nation: *Provided however,* That no part of the three last-mentioned sums shall be allowed or paid to any other person or persons, whatsoever, than those who are actual and *bona fide* members of the Creek Nation and belonging, respectively, to the three classes of claimants designated; said sums to be remitted and paid as soon as practicable after the general council shall have ascertained and designated the persons entitled to share therein. And *provided further,* That any balance of the said sum of seventy thousand dollars, which may be found not to be actually necessary for the adjustment and settlement of the claims for which it is set apart, shall belong to the nation, and be applied to such object or objects of utility or necessity as the general council shall direct. The remaining sum of two hundred thousand dollars shall be retained by the United States, until the removal of the Seminole Indians, now in Florida, to the country west of the Mississippi River herein provided for their tribe; whereupon the same, with interest thereon, at five per cent., from the date of the ratification of this agreement, shall be paid over to, or invested for the benefit of the Creek Nation, as may then be requested by the proper authorities thereof. *Provided however,* That if so paid over, it shall be equally divided and paid *per capita* to all the individuals and

members of the Creek Nation, or be used and applied only for such objects or purposes of a strictly national or beneficial character as the interests and welfare of the Creek people shall actually require.

APPENDIX B

The General Accounting Office Report

The General Accounting Report is divided into four main parts. The introductory portions, printed in their entirety in the record (R. 15–18), explain the purpose and scope of the report. Part I of the report, which is also printed in its entirety in the record (R. 18–20), is a summary of the disbursements made by the United States for the benefit of the Creek Nation of Indians from August 7, 1790, to June 30, 1929, taken from the disbursement schedules in Part III. Part II sets out the contentions of the Creek Nation in case No. H–510. Since none of those contentions was particularly relevant to the issues of the present case, none of Part II was in evidence before the Indian Claims Commission or is in the present record. Part III of the G.A.O. Report contains specific information relating to disbursements made by the United States for the benefit of the Creek Nation pursuant to and in connection with various treaties, agreements, and acts of Congress from August 7, 1790, to June 30, 1929. Large portions of Part III are printed in the record (R. 21–129). Part IV contains a complete list of appropriations and funds under which disbursements were made to the Creek Nation. Some of these lists are printed in the record (R. 130–138). Three more of these lists appear in Appendix C, *infra*, pp. 62–63.

Sections A through R of Part III set forth information on disbursements pursuant to specified treaties or agreements. Each of these sections begins by

quoting the treaty provisions which create the obligations; the quotations from the treaty provisions have been omitted in the printed record. Next follows a narration of what the attached statements, abstracts, and disbursement schedules show. The statements summarize the disbursements made pursuant to the particular treaty, listing them according to the reason for which they were made, *e.g.*, depredations, annuities, education, *etc.* The abstracts summarize the disbursements according to the kind of appropriation under which they were made, *e.g.*, Indian Department, Fulfilling Treaties with Creeks, *etc.* Finally, the disbursement schedules give a detailed, year-by-year breakdown of the disbursements to the Creeks.

The introductory discussion in Section A, which shows the disbursements made under the Treaty of August 7, 1790, 7 Stat. 35, is the most thorough of all and describes some of the accounting and reporting problems common to several of the treaties (R. 21–27). This discussion points out that, from 1799 to 1836, Congress appropriated money to pay the annuity promised in the 1790 Treaty, but that the appropriations were listed under a variety of headings. Because of the impracticability of separating all the disbursements according to the changing appropriation titles, the compilers of the report used the general heading "Annuities to Creek Indians." Appropriations from 1837 to 1902 were made under the headings "Fulfilling Treaties with Creeks" or "Fulfilling Treaties with Various Indian Tribes." Disbursements for the period from 1899 to 1902, however, were not included in the sections dealing with particular treaties because of the different way in which they were paid (see R. 118–119). In 1902, Congress converted all the permanent annuities of

the Creek Nation into a lump sum and deposited $999,368 in the Creek General Fund (R. 22, 118).

A further problem discussed in the introductory portion of Section A is that of properly attributing disbursements known to have been made to the treaty under which they were made. Although General Accounting Office was unable to find any amounts disbursed between 1790 and 1809 for annuity goods attributed specifically to the 1790 Treaty, it did find that some annuity goods were furnished to the Creeks during this period (R. 23). After setting forth these amounts, the report continues (R. 24):

> During the years 1790 to 1809, various amounts were advanced to disbursing officers for annuities, but due to the fact that in most instances the names of the tribes for which the annuities were intended are not set out, it is impossible to state what portion, if any, of the amounts set out in the foregoing tabulation were in fulfillment of the aforesaid Treaty of August 7, 1790. It appears, however, that portions of said amounts were in fulfillment of treaties with said Indians subsequent to the aforesaid Treaty of 1790, as the value of the goods furnished said Indians during the years indicated was in excess of the $1,500 annuity due said Indians under said Treaty.

This problem of incompletely identified disbursements continued up to 1837, as can be seen from this further comment on the 1790 Treaty (R. 24):

> Due to the incompleteness of the ledger accounts covering the period prior to the year 1837, and the fact that the annuities forwarded to the Creek Nation of Indians, as outlined on pages 102 and 103 [R. 22–24, fols. 29–30],[1]

[1] Because of the great number of cross-references in the record using page numbers of the original report, we have

> can not be definitely identified with a particular treaty and appropriation, it has been found impracticable to set out statements disclosing disposition of moneys appropriated to fulfill the aforesaid Treaty of August 7, 1790, prior to the year 1837. * * *

For the period from 1837 to 1902, there is a slightly different reporting problem (R. 25):

> Due to the fact that various treaties with the Creek Nation of Indians provided for the same objects during the same periods, and the money appropriated to fulfill one treaty was advanced to disbursing officers with money appropriated to fulfill other treaties, *it was found impracticable to set out a balanced statement of moneys appropriated for each treaty separately.* * * * [Emphasis added.]

Thus Statement No. 3 (R. 29-32) shows that, although the General Accounting Office was able to balance the total amount available for disbursement from 1837 to 1902 with the total amount disposed of during that period, it was unable to balance the amounts appropriated for each treaty with the amounts disbursed pursuant to specific treaty provisions from 1837 to 1902. The remainder of the introductory portion of Section A explains the disbursements actually made in as great detail as possible (R. 25-27).

As stated earlier (*supra*, p. 56), Sections A through R of Part III of the G.A.O. Report furnish data on disbursements attributable to specific treaties or agreements. The last two sections of Part III, however, deal with disbursements not attributable to specific treaties. Section S explains how appropriations were made from 1899 to 1902

---

printed at the end of this Appendix a table showing where these original pages appear in the record.

and its Statement No. 59 shows disbursements made from July 1, 1898, to June 30, 1929 (R. 118–121).[2] Section T of Part III, set out in its entirety in the record (R. 122–129), deals with disbursements made between 1811 and 1834 which cannot be attributed to particular treaties. The problems connected with Section T are discussed in the Statement, *supra*, pp. 5–6).

Those parts of the General Accounting Office Report printed in the record contain a great number of cross-references using the page numbers of the original report. For the convenience of the Court, we here set out a table of the page numbers in the record, the page numbers of the report, and the folio numbers of the record from the Court of Claims.

Record	Report	Folio	Record	Report	Folio
15	Inside cover	18	32	113	40
	Title Page	19	33	114	41
16	1	20	34	115	42
17	2	21	35	116	43
18	3	22	36	117	44
	4	23	37	118	45
19	5	24	38	119	46
20	6	25	39	120	47
21	97	26		121	48
	100	27		125	49
22	101	28		126	50
	102	29	41	127	51
23	103	30		129	52
24	104	31		130	53
25	105	32	42	131	54
	106	33		132	55
26	107	34	43	133	56
27	108	35	44	134	57
28	109	36		135	58
29	110	37	45	136	59
30	111	38	46	137	60
31	112	39	47	138	61

[2] The first paragraph on R. 118 is from Section Q which is entitled "Disbursements Pursuant to and in Connection with the Agreement of January 19, 1889, ratified by the Act of March 1, 1889; and the Act of May 27, 1902." Section S begins with folio 140 on R. 118. The omission indicated in the middle of R. 118 represents 164 pages in the G.A.O. Report.

Record	Report	Folio	Record	Report	Folio
48	139	62	93	431	113
49	140	63	94	432	114
	141	64	95	433	115
	144	65	96	434	116
50	145	66	97	436	117
51	146	67		442	117a
	147	68		443	118
52	148	69	98	444	119
53	149	70		445	120
	158	71	100	446	121
54	165	72	101	447	122
55	205	73	102	450	123
	272	74	103	451	124
56	297	75	104	452	125
57	298	76	105	453	126
58	299	77	106	454	127
59	313	78	107	455	128
60	319	79	108	456	129
61	320	80	109	457	130
62	321	81	110	458	131
63	322	82	111	459	132
64	323	83	112	460	133
65	329	84	113	461	134
66	333	85	114	462	135
67	334	86	115	479	136
68	335	87	116	480	137
69	336	88	117	481	138
70	342	89	118	508	139
71	371	90		672	140
	377	91	119	673	141
	378	92	120	674	142
73	379	93		675	143
74	380	94	121	676	144
75	381	95	122	681	145
76	382	96		682	146
77	383	97	123	683	147
78	384	98	124	684	148
79	385	99	125	685	149
80	386	100	126	686	150
81	387	101	127	687	151
82	388	102	128	688	152
83	389	103	129	695	153
84	390	104	130	697	154
85	391	105	131	698	155
86	392	106	132	707	156
87	393	107	133	708	157
88	394	108	134	710	158
89	395	109	135	711	159
90	396	110	136	712	160
91	397	111	137	713	161
92	422	112	138	714	162

APPENDIX C

APPROPRIATIONS LIST

"ANNUITIES TO CREEK INDIANS"

(Pursuant to the Treaty of August 7, 1790)

(For disbursements under this appropriation, see Disbursement Schedule No. 1, page 117.) [1]

Year	Act	Stat	Amount appropriated	Year	Act	Stat	Amount appropriated
1799	Feb. 23, 1799	1-618	$1,500.00	1818	Feb. 25, 1799	1-618	$1,500.00
1800	Feb. 25, 1799	1-618	1,500.00	1819	Feb. 25, 1799	1-618	1,500.00
1801	Feb. 25, 1799	1-618	1,500.00	1820	Feb. 25, 1799	1-618	1,500.00
1802	Feb. 25, 1799	1-618	1,500.00	1821	Feb. 25, 1799	1-618	1,500.00
1803	Feb. 25, 1799	1-618	1,500.00	1822	Feb. 25, 1799	1-618	1,500.00
1804	Feb. 25, 1799	1-618	1,500.00	1823	Feb. 25, 1799	1-618	1,500.00
1805	Feb. 25, 1799	1-618	1,500.00	1824	Feb. 25, 1799	1-618	1,500.00
1806	Feb. 25, 1799	1-618	1,500.00	1825	Feb. 25, 1799	1-618	1,500.00
1807	Feb. 25, 1799	1-618	1,500.00	1826	Feb. 25, 1799	1-618	1,500.00
1808	Feb. 25, 1799	1-618	1,500.00	1827	Feb. 25, 1799	1-618	1,500.00
1809	Feb. 25, 1799	1-618	1,500.00	1828	Feb. 25, 1799	1-618	1,500.00
1810	Feb. 25, 1799	1-618	1,500.00	1829	Feb. 25, 1799	1-618	1,500.00
1811	Feb. 25, 1799	1-618	1,500.00	1830	Feb. 25, 1799	1-618	1,500.00
1812	Feb. 25, 1799	1-618	1,500.00	1831	Feb. 25, 1799	1-618	1,500.00
1813	Feb. 25, 1799	1-618	1,500.00	1832	June 4, 1832	4-527	1,500.00
1814	Feb. 25, 1799	1-618	1,500.00	1833	Feb. 20, 1833	4-616	1,500.00
1815	Feb. 25, 1799	1-618	1,500.00	1834	June 26, 1834	4-681	1,500.00
1816	Feb. 25, 1799	1-618	1,500.00	1835	Mar. 3, 1835	4-788	1,500.00
1817	Feb. 25, 1799	1-618	1,500.00	1836	June 14, 1836	5-44	1,500.00

[1] This table appears at p. 696 of the G.A.O. Report.

"FULFILLING TREATIES WITH CREEKS"

(Pursuant to the Treaty of January 4, 1845)

(For disbursements under this appropriation, see Disbursement Schedule No. 86, pp. 430 to 434.) [1]

Year	Act	Stat.	Amount appropriated	Year	Act	Stat.	Amount appropriated
1847	June 27, 1846	9-28	$6,000.00	1857	Aug. 18, 1856	11-79	$6,000.00
1848	Mar. 1, 1847	9-136	3,000.00	1858	Mar. 3, 1857	11-173	6,000.00
1849	July 29, 1848	9-255	3,000.00	1859	May 5, 1858	11-278	6,000.00
1850	Mar. 3, 1849	9-385	3,000.00	1860	Feb. 28, 1859	11-393	6,000.00
1851	Sept. 30, 1850	9-547	3,000.00	1861	June 19, 1860	12-49	6,000.00
1852	Feb. 27, 1851	9-577	6,000.00	1862	Mar. 2, 1861	12-225	6,000.00
1853	Aug. 30, 1852	10-44	6,000.00	1863	July 5, 1862	12-510	6,000.00
1854	Mar. 3, 1853	10-228	6,000.00	1864	Mar. 3, 1863	12-778	6,000.00
1855	July 31, 1854	10-319	6,000.00				
1856	Mar. 3, 1855	10-699	6,000.00				90,000.00

"INDIAN DEPARTMENT"

(For disbursements under this appropriation, see Disbursement Schedules Nos. 4, 9, 11–13, and 107, pp. 136, 149, 157, 196, and 687 to 689.) [2]

Year	Act	Stat.	Amount appropriated	Year	Act	Stat.	Amount appropriated
1805	Feb. 14, 1805	2-315	$92,000.00	1814	Mar. 19, 1814	3-105	$464,500.00
1806	Apr. 18, 1806	2-315	90,000.00	1815	Mar. 3, 1815	3-223	200,000.00
1807	Jan. 10, 1807	2-413	108,000.00	1816	Apr. 20, 1816	3-330	200,000.00
1808	Mar. 3, 1808	2-470	140,000.00	1820	Apr. 14, 1820	3-583	200,000.00
1809	Mar. 3, 1809	2-545	127,000.00	1821	Mar. 3, 1821	3-634	230,205.44
1810	Mar. 2, 1810	2-563	146,000.00	1822	May 7, 1822	3-687	145,000.00
1811	Feb. 6, 1811	2-616	140,500.00	1823	Mar. 3, 1823	3-749	90,000.00
1812	Feb. 21, 1812	2-683	164,500.00	1824	May 26, 1824	4-30	95,000.00
1812	July 6, 1812	2-781	20,000.00	1825	Mar. 3, 1825	4-9	95,000.00
1813	Mar. 3, 1813	2-823	164,500.00	1828	May 9, 1828	4-268	100,000.00

[1] This table appears at p. 713 of the G.A.O. Report.
[2] This table appears at p. 718 of the G.A.O. Report.